Supreme Court of the United States

OCTOBER TERM, 19

No. 347

JOHN MARTIN BIGELOW, AS RECEIVER OF ESTATE OF THE MORROCO HOLDING COMPANY, INC., PETITIONER,

vs.

EDWARD MARCOLINE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED ON

(33,000)

(33,656)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 347

JOHN MARTIN RIEHLE, AS RECEIVER IN EQUITY OF THE MOROSCO HOLDING COMPANY, INC., PETITIONER,

vs.

EDWARD MARGOLIES

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1] **IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK**

ROBERT L. HATCH, Plaintiff,

against

MOROSCO HOLDING COMPANY, INC., Defendant

BILL OF COMPLAINT—Filed July 23, 1923

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The plaintiff herein by this bill of complaint, on his own behalf and on behalf of all other creditors of the defendant who may elect to come in and contribute to the expense of these proceedings, or who may hereafter join in the prosecution of this suit, shows and submits to the Court as follows:

First. That plaintiff is a citizen of the State of New York and resides in the Borough of Manhattan, in the City of New York, in New York County, within the State of New York.

[fol. 2] Second. That the defendant was incorporated under the laws of the State of Delaware, one of the States of the United States of America, and exists by virtue of the Statutes of said State, and is a citizen and resident of said State. The said defendant has a place of business in the State of New York, in the Borough of Manhattan, in the Southern District of New York, at No. 217 West 45th Street.

Third. The ground upon which jurisdiction of the Court depends is the diversity of citizenship and the amount involved is in excess of Five Thousand ($5,000) Dollars. That this suit in equity is brought for the purpose of enforcing claims against the Morosco Holding Co., Inc., for the appointment of a Receiver or Receivers; determination of claims of creditors of the company; the marshalling of assets and the sale and distribution of the company's assets.

Fourth. That the defendant corporation is indebted to the plaintiff in the sum of Six Thousand ($6,000) Dollars, which said sum is due the plaintiff by reason of the following facts and circumstances: That heretofore and on or about the 1st day of February, 1923, the defendant corporation did, for full value received, issue its certain negotiable paper, to wit—a check in the sum of Six Thousand ($6,000) Dollars, drawn upon the Gotham National Bank, in the Borough of Manhattan, City of New York, to the order of one August Janssen. That said check was thereafter and on or about the 3rd day of February, 1923, for full value received, duly endorsed by said August Janssen and delivered to the said plaintiff and the said plaintiff is now [fol. 3] the owner and holder of the said instrument. That from time to time, plaintiff has presented said check for payment at the bank upon which it was drawn, to wit, the Gotham National Bank, and payment thereof has been refused, and that upon information and belief, said defendant corporation has never, at any time since the issuance of said check, had on deposit in the Gotham National Bank funds sufficient to cover the same. That the said August Janssen is a citizen of the State of New York and resides in the Borough of Manhattan, City of New York, County of New York, in the Southern District of New York. Said sum of Six Thousand ($6,000) Dollars is wholly unpaid and there are no offsets or counterclaims thereto.

Fifth. That upon information and belief, the defendant company was organized under the laws of the State of Delaware on or about the 20th day of March, 1921, and has outstanding One Hundred Seventy-five Thousand (175,000) shares of its capital stock, Fifteen Thousand (15,000) shares of which consist of preferred stock, of the par value of One Hundred ($100) Dollars per share, and One Hundred Sixty Thousand (160,000) shares of said capital stock are common shares, without nominal or par value.

Sixth. That upon information and belief, the defendant company is also the owner of stock of other corporations, to wit—the owner of the capital stock of the Morosco Theatre Co., Inc., a New York corporation. That upon information and belief, the amount of capital stock of the Morosco Theatre Co., Inc., which the said defendant com-

pany is the owner of, is One Hundred (100) shares of the par value of One Hundred ($100) Dollars and that upon in-
[fol. 4] formation and belief said amount is, for all practical purposes, the entire issued capital stock of said Morosco Theatre Co., Inc.; and is the owner of the entire capital stock of the Morosco Productions Co., Inc., a California corporation.

Seventh. That the defendant company owns valuable real property and leaseholds of real property in the State of California and in the State of New York and it leases real property. That said defendant company is also the owner of certain memberships in certain theatrical producing organizations and associations; that it is the owner of numerous copyrights for dramatic plays and for motion picture productions; that it is the owner of large amounts of "properties" used in theatrical productions of various types; that it is the owner of large amounts of fixtures, furniture, equipment, theatrical equipment, royalty contracts; that said defendant company is also the owner of a large amount of notes receivable and accounts receivable; that said defendant also owns valuable contracts and among which is a valuable contract with the Associated First National Pictures, Inc., a motion picture distributor.

Eighth. That the defendant company is engaged in the business of theatrical production and motion picture production and has been engaged in the leasing out of certain of its leaseholds to other persons, concerns and corporations at a profit.

Ninth. That heretofore and pursuant to certain arrangements made between this Company and one Oliver Morosco, the defendant company did take over certain obligations of
[fol. 5] the said Oliver Morosco to one Annie T. Morosco, upon information and belief, the former wife of said Oliver Morosco. That upon information and belief, said obligations so taken over, remain a lien upon the assets of the defendant company, and upon information and belief, the amount of said lien at said time is in excess of Thirty Thousand ($30,000) Dollars. That upon information and belief, the time for payment of said lien of Annie T. Morosco has matured and the said obligations have matured and are now due and owing to said Annie T. Morosco and

the said Annie T. Morosco is in a position to foreclose the said lien upon the assets of the said defendant company. That there is now due to certain banks on the notes of the defendant company, or will, within the next thirty days become due to said institutions, sums of money in excess of Two Hundred Thousand ($200,000) Dollars, and that upon information and belief, the defendant company has no immediate means of meeting the said obligations. That many of the company's notes all outstanding have become due at the present time and that the company is subject to being sued on said notes and the said banks are pressing the defendant for immediate payment. That in such an event, judgment would follow suit, and execution would result in a great loss, and upon information and belief, an unnecessary loss to the defendant company and its creditors and stockholders. That there are also outstanding accounts payable for current expenses in a sum approximating Thirty-five Thousand ($35,000) Dollars and that such outstanding current accounts should be paid in order to preserve the valuable assets of the defendant corporation, but that as conditions exist with reference to the cor- [fol. 6] poration today, it will be inadvisable on the part of any person to endeavor to aid in the financing of said corporation, owing to the fact that the corporation is likely to be harassed, as is more fully mentioned hereinafter. That there are payments necessary to be made in the near future, in order to preserve the valuable leaseholds of the defendant, and that the defendant has no immediate means at hand to make such payments. Upon information and belief, there has been proposed by one of the officers of the company the outright sale at a sacrificial price of a valuable leasehold of theatre property in Los Angeles belonging to the defendant, and that the consummation of any such project of sale would greatly decrease the material assets of the company and injure its prestige. That upon information and belief, there is due and owing to one Oliver Morosco, the former president and director of the defendant corporation, the sum of approximately Twenty-six Thousand ($26,000) Dollars, which said sum is payable weekly in installments of Five Hundred ($500) Dollars, and as evidence of which indebtedness against the defendant corporation, the said Oliver Morosco holds fifty-two (52) prom-

issory notes of the company in the sum of Five Hundred ($500) Dollars each. That upon information and belief, said holder of said notes can, in the event of the failure of payment of any one thereof, proceed against the defendant corporation, and that upon information and belief, in all likelihood a default in the payment of any one of said notes would be met by vigorous legal proceedings. That by reason of the critical situation which the defendant company finds itself in, it is, upon information and belief, impossible for it to operate its assets in such a manner as to properly meet its obligations, for the reason that no credit [fol. 7] can be obtained for the said defendant company, nor can any person or persons be approached with any hopes of success of financial assistance while the company is such as is outlined above. That the granting of relief asked for in this petition would tend to stabilize financial exigencies of the defendant corporation and tend to maintain the status quo of its affairs, which results might enable it to properly and in the most economical manner bring about an equitable distribution of its assets without the attendance of frightful loss in the undertaking. That upon information and belief, there are at the present moment four main sources of danger to the defendant company. These four sources are as follows: The bank creditors of the company; Annie T. Moroseo; the largest creditor of the company is one August Janssen, its president, whom the company is indebted to in a sum exceeding One Hundred Forty Thousand ($140,000) Dollars for cash contributions, and he is also the guarantor on the company's notes at the bank to the sum of approximately Two Hundred Twenty-five Thousand ($225,000) Dollars; and the current creditors whose accounts aggregate approximately Thirty-five Thousand ($35,000) Dollars. That these four groups are not exclusive, but that the waging of any conflict between them on the open field of battle would be, as has been above intimated, disastrous. That the only means whereby the defendant can meet its obligations is by the continued maintenance and operation of its assets, to wit—its theatre properties, its motion picture productions and its general business as a theatrical and motion picture producer.

Tenth. Unless this court of equity takes the property and assets of the defendant into judicial custody, the re- [fol. 8] sult would be a multiplicity of suits and a race of diligence. Any attempt on the part of the plaintiff to enforce his claims as a general creditor would precipitate similar action on the part of other creditors and would in turn lead to wasteful strife and controversy which plaintiff believes can be avoided; and the property of the company preserved for equitable distribution only by the intervention of a court of equity and the granting of equitable relief, including the appointment of a receiver. That the aforesaid condition of affairs, which would follow in the absence of the intervention of equity, would result in the spoliation of valuable assets at the hands of individual creditors whose haste, as the Court can well appreciate, would render practically valueless many of the valuable assets of the company, such as its leasehold of theatrical properties, its copyrights and its membership rights as a theatrical producer. That upon information and belief, the defendant company is the owner, subject to liens not in excess of Thirty Thousand ($30,000) Dollars, of two leaseholds, one in New York City, at No. 217 West 45th Street, and one in the City of Los Angeles, in the State of California. That upon information and belief, each of these said leaseholds is worth Sixty Thousand ($60,000) Dollars a year, and at the present computed value are easily worth the sum of Three Hundred Thousand ($300,000) Dollars. That either of said leaseholds might be sacrificed for practically nothing at the diligent prosecution of some individual creditor. That the stock financing of the said company, upon information and belief, is not as yet complete in that there are many outstanding notes of stock subscribers who purchased the stock of the company on a partial payment plan who have not completed their payment [fol. 9] for stock, and the said accounts receivable may still be saved to the company under proper leadership and guidance of this Court, whereas in the event of a race of diligence on the part of various individual creditors, the situation will be one of such confusion to terrify any such debtor of the company. Upon information and belief, said company is solvent and could meet its obligations if proper protection be afforded to it during such period of time

as may be necessary to calmly and thoroughly liquidate its assets or operate itself into a position where the present critical situation has been overcome. Otherwise great and severe loss will be inflicted on all the creditors and stockholders of the defendant.

Eleventh. In consideration whereof and inasmuch as plaintiff has no adequate remedy at law and can have relief only in equity, the plaintiff files this bill of complaint on behalf of himself and all of the other creditors of the defendant who may come in and contribute to the expense hereof, and prays for equitable relief as follows:

1. That the rights of the plaintiff and of all other creditors of the defendant may be ascertained and decreed; that the Court will fully administer the funds in which the plaintiff is interested, constituting the entire property and assets of the defendant company.

2. That for the purpose of preserving intact the property and assets of the defendant, a receiver or receivers may be appointed of the defendant and of all its properties and assets, real and personal, of whatsoever nature and description, and wheresoever situate, with full power to sue for, [fol. 10] collect, receive and take into his possession the goods, chattels, rights, credits, monies, effects, lands, tenements, books, papers, properties and assets of every description of the defendant, and with all the incidental powers ordinarily vested in receivers in like cases, with full power to operate the assets and to collect and receive all rents and profits and to protect and preserve the property rights, the franchises, the memberships, and to do all and everything necessary to the preservation of the company's assets, and to continue the business of the company, pursuant to the powers conferred upon the company by its State Charter, if in the opinion of the receiver or receivers, the company's assets can be enhanced, protected or preserved by the continuance of its business and the operation of its assets.

3. That at such time as may be found proper, the property of the defendant may be ordered to be sold in whole or in part and any order of sale may make proper and suitable provisions for the preservation of all equities,

rights, priorities and liens of creditors and the proper distribution of the proceeds of sale. That such properties may be sold subject to or free and clear of all liens and encumbrances. Or that in the event that the Court shall so adjudicate, the said property of the defendant may be returned to it; and that plaintiff may have such other and further relief as shall to the Court seem proper and as may be necessary to fully protect and enforce the rights and equities of the plaintiff and of all the creditors and stockholders of the defendant.

4. That temporarily and pending the suit, an injunction may issue against the defendant and all persons claiming or acting under it, to restrain them from interfering with [fol. 11] said receiver or receivers taking possession of such property and assets, and that the plaintiff have such other and further relief in the premises as the nature of the case may require and may be agreeable to equity.

5. That the defendant be required to answer all and singular the matters above stated, but not under oath, answer under oath being hereby expressly waived.

6. That a writ of subpœna may be granted to plaintiff to be directed to the defendant thereby requiring the said defendant personally to appear on a certain day before the Court and then and there full, true and direct and perfect answers to make to all and singular the premises, but not under oath, answer under oath being hereby expressly waived, and further to perform and abide by such further order, direction or decrees therefor as to the Court shall seem meet.

F. Wright Moxley, Solicitor for Plaintiff, 68 William Street, New York City.

[File endorsement omitted.]

[fol. 12] *Duly sworn to by Robert L. Hatch. Jurat omitted in printing.*

[fol. 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER

The Morosco Holding Co., Inc., hereby files its answer to the bill of complaint herein or unto so much thereof and such parts thereof as such defendant is advised it is necessary or material for such defendant to make answer to and answering says:

First. The defendant admits all the allegations of said bill of complaint.

Second. The defendant reiterating the admissions of the preceding article "First" of this answer, joins in the prayer of such bill of complaint and prays that the Court may take possession of the assets of the company through the appointment of a receiver and hereby protect and preserve the assets of the company and the said receiver may be empowered to collect outstanding obligations due the company and that the Court may direct that a proper order may be entered of sale and distribution of the assets of the company which will recognize the equities, priorities and liens [fol. 14] against the assets of the company of every nature and description, and that an injunction shall issue which will by its terms protect the receiver from interference in his possession of said assets by the defendant or by any of its representatives and that the Court confer upon the said receiver such power as in the Court's opinion may be necessary to effectually bring about complete preservation of the assets of the company to the end that full equity may be done in every instance to every person who is entitled to equitable relief under all the circumstances and in all the premises.

Third. That the defendant becomes obedient to this court of equity and prays for its instruction and direction.

Hyman Bushel, Solicitor for Defendant, Morosco Holding Co., Inc. Office & P. O. address: No. 1482 Broadway, Borough of Manhattan, city of New York.

[fol. 15] *Duly sworn to by August Janssen. Jurat omitted in printing.*

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION FOR ORDER CONFIRMING REPORT OF SPECIAL MASTER

SIRS:Please take notice, that upon the report of Special Master Bern Budd, Esq., dated September 23, 1927, filed in the office of the United States District Court for the Southern District of New York, on the 26th day of September, 1927, and upon the minutes had in the proceedings before the Special Master on the hearing of the claim of Edward Margolies against Morosco Holding Company, Inc., held in the office of the Special Master at 111 Broadway, in the Borough of Manhattan, City of New York, on the 20th day of September, 1927, and upon all the proceedings heretofore had herein by virtue of which the said hearing on the claim of Edward Margolies against Morosco Holding Company, Inc., was referred to the said Special Master for hearing and determination, the undersigned will move this court at a Special Term for motions to be held at Room 235 of the General Post Office Building in the Borough of Manhattan, City of New York, on the 4th day of October, 1927, at 10 o'clock in the forenoon of that [fol. 17] day, or as soon thereafter as counsel can be heard, for an order confirming the report of the Special Master herein, and for a decree allowing the claim of Edward Margolies herein, in the sum of Fifty-five thousand one hundred one Dollars and Forty-one Cents ($55,101.41), and for such other and further relief as to this court may seem just and proper.

Dated New York, September 30, 1927.

Yours, etc., Nathan Burkan, Attorney for Claimant, Edward Margolies, 1451 Broadway, Borough of Manhattan, City of New York.

To F. Wright Moxley, Esq., Attorney for the Receiver herein, 68 William Street, Borough of Manhattan, City of New York.

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

MINUTES OF HEARING BEFORE SPECIAL MASTER

Before Bern Budd, Esq., Special Master, 111 Broadway, New York City, September 20th, 1927, at 2.30 P. M.

Appearances:

F. Wright Moxley, Esq., attorney for John Martin Riehle, Esq., Receiver.

Nathan Burkan, Esq., attorney for claimant.

The Master: Go ahead, Mr. Burkan.

Mr. Burkan: Now, Mr. Budd, I offer in evidence order of Judge Winslow, made in this proceeding on the 12th day of July, 1927.

The Master: Is that the original?

Mr. Burkan: The original is on file.

The Master: You file with me a copy of it?

Mr. Burkan: A copy, yes.

[fol. 19] The Master: I have a copy here.

Mr. Burkan: And I also offer in evidence the notice of hearing, with admission of service of Mr. Moxley.

The Master: It is filed.

Mr. Burkan: And I offer in evidence an exemplified copy of the judgment roll in the suit of Edward Margolies against the Morosco Holding Company, Inc., rendered in the Supreme Court, Kings County, on the 16th day of May, 1925.

Mr. Moxley: The Receiver objects to it upon the ground that that has no materiality to this proceeding, and, off the record——

The Master: Let us have it all on the record.

Mr. Moxley: Well, that is all.

The Master: The exemplified copy is received in evidence, in accordance with the direction contained in the order referring this matter to me, dated July 12th, 1927. An exception to the Receiver. Mark it.

(Marked Claimant's Exhibit 1, September 20th, 1927.)

Mr. Burkan: You will note, Mr. Budd, that the principal amount of this judgment is $49,407.88, and the costs awarded under that judgment were $138.35. I am excluding the interest awarded by that. Instead, I have computed the interest from the 14th day of December, 1925, in pursuance of the order of Judge Winslow.

The Master: After deducting from the judgment the amount of interest included in the judgment, what figure have you?

Mr. Burkan: $49,596.23.

The Master: And have you computed, in lieu of the interest deducted, interest from December 14th, 1925?

Mr. Burkan: I have, sir.

[fol. 20] The Master: And what is that figure?

Mr. Burkan: And that figure is $5,505.18. Making a total of $55,101.41. And the claimant rests.

Mr. Moxley: It would be the aim of the Receiver here to save the receivership estate some expense, if possible, and I thought if possibly Mr. Burkan would allow me to offer, without the presence of these witnesses, the testimony of the four witnesses, Benjamin A. Lang, Edward Lang, Edmond V. Geroux and Edward Margolies.

The Master: For what purpose?

Mr. Moxley: For the purpose of going into this claim de novo.

Mr. Burkan: I object to it as entirely incompetent, immaterial and irrelevant.

The Master: What is your view as to the conclusiveness of this judgment roll?

Mr. Burkan: Absolutely final, and so held by the Circuit Court of Appeals.

The Master: And as I read the order of reference, I must accept that as conclusive proof; and therefore I must reject, I think, any testimony of any nature whatsoever from the Receiver.

Mr. Moxley: Well, all I would like is that Mr. Burkan would waive the necessity of these witnesses being present. If not, I will ask for a week's adjournment, and I will have to have them all here. That will cost me considerable money to bring them here and put them on the stand, that is the point.

The Master: I think we can get a record here, without the presence of the witnesses.

Mr. Moxley: I think so.

Mr. Burkan: Except this, Mr. Budd: So far as I am concerned, I absolutely object——

The Master: Why don't you make an offer of proof, so that he will have his record?

[fol. 21] Mr. Burkan: I should like to object, upon the record, for my protection. I object to any offer of proof, or any tender of proof, upon the ground that this judgment is absolutely conclusive, and so has been held by the Circuit Court of Appeals.

The Master: I understand that. Let him make it first, then you can object to it. Make your offer of proof.

Mr. Moxley: I offer to prove by the witnesses Benjamin A. Lang, Edward J. Lang, Edmond V. Geroux and Edward Margolies that the damages and claims of Edward Margolies against the Morosco Holding Company will not exceed $12,000.

The Master: Now, your objection to that, Mr. Burkan?

Mr. Burkan: I object to it upon the ground it is incompetent, immaterial and irrelevant, not binding upon the claimant; and the claimant will not consent to any such waiver, nor to the acception of any such evidence.

The Master: The objection is sustained upon the ground that the order referring this matter to me directs me to accept as conclusive proof of the claim the judgment roll which has been offered in evidence.

Mr. Moxley: Of course, I want to be frank and say I have not here Benjamin E. Lang or Edward J. Lang, and if any objection is taken to the fact that I have not them here, I would like a week's adjournment, within which time I will have to pay their carfare to get them here and put them on the stand. That is the only way.

The Master: My ruling would be the same if they were here.

Mr. Moxley: Well, will you waive the necessity of my bringing them here, Mr. Burkan? To show the Receiver's good faith, I have an affidavit——

[fol. 22] The Master: I do not think he needs to waive it. You have offered to prove it and he has objected to it and I have sustained it.

Mr. Moxley: You have refused to allow me to put anybody on?

The Master: Yes. I think that under the order of reference I must refuse any proof of any nature whatsoever, except possibly as to the correctness of the exemplification.

Mr. Moxley: Well, of course, I have not anything in that line. So that as I understand the Special Master's ruling, you refuse to allow me to call any witness to the stand to show that this claimant's claim is less than the amount of this judgment?

The Master: I so rule, with an exception to you.

Hearing closed.

[fol. 23] In United States District Court

[Title omitted]

Special Master's Report

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

I, Bern Budd, to whom it was referred, as Special Master, by order of this Court dated July 12th, 1927, to hear the claim of the above-named claimant, and to report thereon to this Court, do respectfully report as follows:

Upon the hearing before me, I was attended by F. Wright Moxley, Esq., for the Receiver, in opposition to the claim of the claimant, and by Nathan Burkan, Esq., in support of the claim.

On July 1st, 1923, John M. Riehle was appointed Receiver of the property, assets and effects of the defendant. The Receiver objected to the claim made by Edward Margolies and rejected the claim, which was thereupon referred to me to hear and report.

The claim was first brought on for hearing by notice served by the Receiver's attorney, returnable before me [fol. 24] November 11th, 1923. The claimant then defaulted, his attorney informing me that he at that time had filed no claim and would not appear. Upon the Receiver's motion, the claim was then dismissed.

Thereafter there was filed with me a verified proof of the claimant's claim, dated May 26th, 1925, for hearing on which I gave notice returnable before me on June 26th, 1925. The Receiver and the claimant appeared by their counsel. The Receiver's counsel contested the right of the Master to hear the claim upon the ground that the period limited by the order of this Court for the filing of claims with the Receiver had expired prior to the receipt of the instant claim. The claim was again dismissed entirely upon this ground.

Thereafter, and on November 27th, 1925, this Court made an order permitting the filing of the claim with the Receiver on or before December 7th, 1925. Before that date the claim was filed, and it came on to be heard before me upon the merits on December 14th, 1925.

The claimant then offered in evidence the judgment roll and an exemplified copy thereof in an action in the Supreme Court of the State of New York, Queens County, wherein he, the claimant, Edward Margolies, was the plaintiff, and the Morosco Holding Company, Inc., was the defendant, which judgment was entered May 16th, 1925. The judgment so entered was in favor of the plaintiff, the claimant herein, and against the defendant, for the sum of $55,283.88, interest upon which, to the date of the hearing, amounts to $1,934.93. The correctness of the exemplification was conceded. Counsel for the claimant stated that the judgment roll and the exemplification of the judgment roll were offered for the purpose of proving the claimant's claim. Its receipt in evidence was objected to upon [fol. 25] the ground that the Circuit Court of Appeals for the Second Circuit had held that the judgment was not binding upon the Receiver.

Upon the authority of the opinion of the Circuit Court of Appeals for the Second Circuit in this suit, directing a vacation of the stay of the action in the State Court, but stating that any judgment in the State Court should not be taken to be a liquidation of the claim of this claimant (5 Fed. 2nd, 1015), I sustained the Receiver's objection to the receipt of the exemplification of the judgment roll in evidence, and recommended the dismissal of the claim.

From the order confirming my report and dismissing the claim, the claimant appealed to the Circuit Court of Ap-

peals, which Court reversed the District Court and remanded the case for further proceedings consistent with the opinion (, Fed. 2nd,).

Pursuant thereto, the District Court made the order of July 12th, 1927, again referring the claim to me as Special Master, which order, inter alia, contains the following provision:

"Ordered, adjudged and decreed that upon the hearing on said claim * * * the claimant may offer in evidence an exemplified copy of the judgment rendered in the Supreme Court of the State of New York, Queens County, in favor of the claimant, Edward Margolies, and against the defendant, Morosco Holding Co., Inc., in the sum of $55,283.88, filed and entered in the office of the Clerk of the County of Queens on May 16th, 1925, and that such exemplified copy of said judgment shall be received as conclusive proof of the claimant's claim against said Receiver, [fol. 26] and said Special Master is hereby directed to accept such proof, except that he deduct from the amount of said judgment the amount of interest included therein and allow in lieu thereof interest from the 14th day of December, 1925 * * *."

The exemplified copy of the judgment was offered in evidence and received, over the Receiver's objection. The Receiver offered to make proof that the indebtedness of the defendant to the claimant was less than the amount of the judgment. This proof was objected to and was rejected upon the ground that its receipt in evidence was precluded under the order of July 12th.

After the deduction of the interest included in the judgment, the amount of the judgment is $49,596.23. Interest from December 14th, 1925, amounts to $5,505.18.

I therefore recommend that an order be made allowing the claim in the sum of $55,101.41.

I file herewith a transcript of the testimony taken before me.

Bern Budd, Special Master.

Dated September 23rd, 1927.

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

EXCEPTIONS TO REPORT OF SPECIAL MASTER

The receiver herein, John Martin Riehle, excepts to the report of Bern Budd, Special Master, dated the 23rd day of September, 1927, and on or about said day entered in the office of the Honorable Clerk of this Court, in the following particulars:

I. To the finding of fact that the claimant, Edward Margolies, in these proceedings has a valid claim against the Morosco Holding Company, Inc., and against the Receiver therein the sum of $55,101.41.

II. To the failure and refusal of the Special Master to hold that the Receiver, John Martin Riehle herein, had a right to submit in opposition to the claim of Edward Margolies proof that the indebtedness of the defendant, Morosco Holding Company, Inc., to the claimant, Edward Margolies, was less than the sum of $55,101.41.

III. To the failure and refusal of the Special Master to [fol. 28] permit the Receiver, John Martin Riehle, to offer evidence to show that the amount of any money due from the Morosco Holding Company, Inc., to the said claimant, Edward Margolies, was less than the amount of the judgment obtained by Edward Margolies against the Morosco Holding Company, Inc., in the Supreme Court of the State of New York, County of Queens, upon which said judgment the said Edward Margolies bases his said claim.

IV. To the conclusions of law found by the Special Master from which it appears that the Special Master admitted the claim on the authority of the opinion of the Circuit Court of Appeals and of a certain order of the United States District Court for the Southern District of New York.

F. Wright Moxley, Attorney for John Martin Riehle, Receiver of Morosco Holding Company, Inc. Office & P. O. address: 1560 Broadway, Borough of Manhattan, City of New York.

Dated New York, October 3rd, 1927.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

MINUTES OF HEARING BEFORE WINSLOW, D. J.

Before Hon. Francis A. Winslow, D. J., New York, October 20, 1927, at 4 P. M.

Hearing on Motion to Confirm Report of Special Master in the Claim of Edward Margolies

Appearances:

F. Wright Moxley, Esq., attorney for John Martin Richle, Esq., Receiver.

Nathan Burkan, Esq., attorney for the claimant.

The Court: Is there anything you want to put on the record?

Mr. Moxley: I would like to have the appearances noted. [fol. 30] Mr. Burkan appearing for the claimant, Edward Margolies, and Mr. Moxley appearing for the Receiver. Mr. Moxley moves——

The Court (interposing): Wait a minute. This is a motion to confirm the report of the Special Master in the claim of Edward Margolies; the report of the Special Master bearing date September 23rd, 1927, on file in this Court.

Mr. Moxley: I make the counter motion that the report be rejected on the ground that the decision of the Circuit Court of Appeals herein, and affecting this very claim, if properly construed, would entitle the Receiver to interpose evidence, which evidence would show that the claim of Mr. Margolies, if any he has, was in a sum very much less than the amount of this judgment of fifty-three odd thousand dollars.

(After colloquy off the record:)

The Court: The report will be confirmed.

Mr. Moxley: Of course, the Receiver will take an exception. Then may I file this memorandum, so it will be in the papers (filing paper)?

Hearing closed.

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF REFERENCE TO SPECIAL MASTER—July 12, 1927

This court having on the 15th day of March, 1926, made an order confirming the report of the Special Master herein, Bern Budd, Esq., dated January 11, 1926, and filed with the Clerk of this court on January 22, 1926, disallowing and dismissing the claim of Edward Margolies against this defendant, and the said claimant, Edward Margolies, having appealed from said order to the United States Circuit Court of Appeals for the Second Circuit, and said appeal having duly come on to be heard and said court having rendered its decision, reversing the said order of this court of March 15, 1926, with costs to said Edward Margolies in the sum of $231.70, and remanding the cause to this court with instructions to proceed in accordance with the decision of said [fol. 32] Circuit Court of Appeals as filed, and having filed its mandate on June 22, 1927, with the Clerk of this court,

It is, on motion of Nathan Burkan, Esq., attorney for claimant, Edward Margolies,

Ordered, adjudged and decreed that said order of this court of March 15th, 1926, be and the same is hereby vacated and set aside; and it is further

Ordered, adjudged and decreed that the claimant, Edward Margolies be, and he hereby is permitted to prove his claim in the sum of $55,283.88 against John Martin Riehle, Esq., the Receiver of this defendant, before Bern Budd, Esq., the Special Master herein, and that said Special Master take proof and testimony with respect to such claim on three days' written notice to be given by said claimant to said Receiver; and it is further

Ordered, adjudged and decreed that upon the hearing on said claim before said Special Master, the claimant may offer in evidence an exemplified copy of the judgment rendered in the Supreme Court of the State of New York, Queens County, in favor of the claimant, Edward Margolies, and against the defendant, Morosco Holding Co., Inc., in the sum of $55,283.88, filed and entered in the office of the Clerk of the County of Queens on May 16, 1925, and that

such exemplified copy of said judgment shall be received as conclusive proof of the claimant's claim against said Receiver; and said Special Master is hereby directed to accept such proof, except that he deduct from the amount of said judgment the amount of interest included therein, and allow in lieu thereof interest from the 14th day of December, 1925, when said exemplified copy of said judgment was first offered in evidence before the Special Master; and it is further

[fol. 33] Ordered, adjudged and decreed that John Martin Riehle, Esq., the Receiver of the defendant, Morosco Holding Company, forthwith pay to the said Edward Margolies the sum of $231.70, the costs allowed by the United States Circuit Court of Appeals for the Second Circuit.

Francis A. Winslow, Judge.

In United States District Court

[Title omitted]

Order Confirming Report of Special Master—Oct. 20, 1927

Edward Margolies, claimant herein having moved this [fol. 34] court for an order confirming the report of Bern Budd, Esq., the Special Master herein, and for a decree allowing the claim of said Edward Margolies, in the sum of $55,101.41,

Now, upon reading and filing the report of Bern Budd, Esq., the Special Master herein, dated September 23rd, 1927, and filed with the clerk of this court on the 26th of September, 1927, and upon the minutes taken in the proceedings had before the Special Master on the hearing of the claim of said Edward Margolies against the Morosco Holding Company, Inc., held in the office of the Special Master, and the exemplified copy of the judgment roll offered before said Special Master and marked "Claimant's Exhibit I," and the order of Hon. Francis A. Winslow, dated the 12th day of July, 1927, which referred the claim of Edward Margolies to said Special Master, and upon the notice of hearing before the Special Master, with proof of service thereof, and the notice of motion herein,

dated September 30th, 1927, to confirm the Special Master's report, and after hearing Nathan Burkan, Esq., in support of said motion, and F. Wright Moxley, Esq., in opposition thereto, and due deliberation having been had,

It is, on motion of Nathan Burkan, attorney for said claimant, Edward Margolies,

Ordered that said motion be and the same is hereby granted, and the said report of the Special Master, Bern Budd, Esq., is hereby in all respects confirmed; and it is further

Ordered that the claim of Edward Margolies against this defendant, the Morosco Holding Company, Inc., be and the same is hereby allowed in the sum of Fifty-five thousand one hundred and one Dollars and Forty-one Cents ($55,101.41).

Francis A. Winslow, United States District Judge.

In United States District Court

[fol. 35] Exemplified Judgment Roll—Claimant's Exhibit 1 for Identification

The People of the State of New York, by the Grace of God Free and Independent, to all to whom these presents may come, Greeting:

Know ye: That we have inspected the files and records in the office of the Clerk of the County of Queens, the Borough of Queens, in said County, do find a certain judgment roll remaining there on file of record in the words and figures following, to wit: Supreme Court, Queens County. Edward Margolies, Plaintiff, against Morosco Holding Co., Inc., Defendant.

[fol. 36] In Supreme Court, Queens County

Edward Mandelbaum, Plaintiff,

against

Monroe Holding Co., Inc., Defendant

Summons

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney, within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Nathan Burkan, Attorney for Plaintiff. Office and Post Office address: 1451 Broadway, New York City, Manhattan Borough.

Dated May 11th, 1923.

[fol. 37] In Supreme Court, Queens County

[Title omitted]

Complaint—Filed May 6, 1925

Plaintiff, complaining of defendant, by Nathan Burkan, his attorney, alleges:

For a First Cause of Action

First. Upon information and belief that at all the times hereinafter mentioned the defendant was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware.

Second. That on or about the 18th day of December, 1922, plaintiff and defendant entered into a contract in writing wherein and whereby the plaintiff agreed to furnish all the

materials and perform all the work in the erection of a theatre and business building to be erected on Spring Street, running back along Exchange Place, in Titusville, Pennsylvania, in accordance with certain drawings and specifications and general conditions, and to complete the [fol. 38] same on or before June 15th, 1923, at a cost to the defendant not to exceed $172,000.00.

A copy of said contract is hereto annexed and marked "Exhibit A."

Third. Said agreement, Exhibit A, further provide that payments to the plaintiff shall be made on or about the tenth day of each month for 85 per cent of the work and materials on the job, and that proper itemized requisitions shall be presented by the plaintiff on or about the 1st day of each month to the architect mentioned in said contract, to wit, one Eugene De Rosa of 110 West 40th Street, New York City.

Fourth. That on or about January 18th, 1923, plaintiff caused the work of construction of said theatre and business building to be begun and caused the foundation of such structure to be excavated and laid and the brickwork on said building to be erected, and caused other work, labor and services to be rendered thereon and materials furnished in connection therewith, so that up to April 5th, 1923, the plaintiff had performed or caused to be performed work, labor and services, and had paid insurance premiums, and had furnished materials in the erection of said building, of the fair and reasonable value of $7,545.46.

Fifth. That plaintiff thereupon presented an itemized requisition to the said architect herein, Eugene De Rosa, on April 5th, 1923, for said amount of $7,545.46, and said requisition was duly approved in writing by said architect, and plaintiff presented such requisition, duly approved, on April 10th, 1923, to the defendant herein and demanded payment of 85 per cent of said sum of $7,545.46, to wit, [fol. 39] $6,413.64, and the defendant failed and refused to pay the same or any part thereof.

Sixth. That plaintiff continued in the performance of said work under the contract, Exhibit A, after April 5th, 1923, and furnished or caused to be furnished work and

labor and services and materials in the construction of the said building, and paid insurance premiums thereon down to May 1, 1923, of the fair and reasonable value of $29,651.54.

Seventh. That thereupon, and on or about the 10th day of May, 1923, plaintiff presented a requisition to the said architect, Eugene De Rosa, for the aforesaid amount of $29,651.54, and that said architect duly approved and certified said requisition in writing and plaintiff thereupon and on or about the 16th day of May, 1923, presented said requisition to the defendant herein and demanded payment of 85 per cent. of said sum of $29,651.54, and the defendant then and there failed and refused to pay said sum or any part thereof.

Eighth. That plaintiff has duly performed the said contract, Exhibit A, and each and every term, condition and covenant thereof on his part required to be performed, except in so far as he was prevented from such performance by the acts of the defendant, and is ready, willing and able to continue to perform said contract.

Ninth. That it was within the contemplation of this contract that payments thereon would be made monthly as required therein, in order that the plaintiff would be enabled [fol. 40] to pay for the work, labor and services rendered and the materials furnished on the job, and that without receiving such payments as and when the same became due plaintiff has been unable to continue to pay for the work, labor and services and materials furnished hereunder, and the acts of the defendant in refusing to make the payments as and when the same became due constitute an essential breach of the said contract, Exhibit A, and constitute a repudiation of said contract, Exhibit A, and by reason of said breach and repudiation on the part of the defendant the plaintiff has been prevented from further performance of the said contract on his part and will continue to be prevented from any further performance on his part.

Tenth. That there is now due and owing to the plaintiff from this defendant the sum of $7,545.46, as per the requisition of April 5, 1923, and the sum of $29,651.54, as per the requisition of May 10, 1923.

As and for a Second Cause of Action

Eleventh. The plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs "First," "Second," "Third," "Fourth," "Fifth," "Sixth," "Seventh," "Eighth" and "Ninth" of this complaint, with the same force and effect as if the same were fully and at length set out.

Twelfth. That in reliance upon said contract, Exhibit A, plaintiff entered into various contracts with sub-contractors for the furnishing of the materials and the performance of the work on said theatre and business building, and the plaintiff obligated himself to pay said sub-contractors divers substantial sums of money therefor.

[fol. 41] Thirteenth. That by reason of the sub-contracts hereinabove set forth, the plaintiff is obligated to pay the various sub-contractors on contracts made between this plaintiff and such sub-contractors with reference to the work aforesaid the sum of $72,184.00, which sum will be the loss incurred by this plaintiff by reason of the defendant's breach and repudiation of the contract; and in addition thereto plaintiff has been deprived of the sum of $15,000.00 profit that he would have made hereunder.

Wherefore plaintiff demands judgment against the defendant in the sum of $124,381.00, with interest on the sum of $7,545.46 from April 5th, 1923, and with interest on the sum of $29,651.54 from May 16, 1923, and with interest on the balance of the sum for which judgment is demanded from the date hereof, besides the costs and disbursements of this action.

Nathan Burkan, Attorney for the Plaintiff. Office & Post Office address, 1451 Broadway, Borough of Manhattan, New York City.

[File endorsement omitted.]

[fol. 42] *Duly sworn to by Edward Margolies. Jurat omitted in printing.*

[fol. 43] State of New York,
City and County of New York, ss:

Robert Burns, being duly sworn, deposes and says that he is over the age of 21 years. That on the eighteenth day of May, 1923, at No. 217 West 45th Street in the Borough of Manhattan, City of New York, he served the foregoing summons and complaint upon Mr. George R. Bentel, the vice-president of the defendant in this action, by delivering to and leaving personally with said George R. Bentel a true copy thereof.

Deponent further says that he knew the person so served as aforesaid to be the person mentioned and described in the foregoing summons and complaint.

Robert Burns.

Sworn to before me this 18th day of May, 1923. Lillian Irene Fink, Notary Public. New York County No. 353. New York Register No. 5305. Bronx County No. 20, Bronx Reg. No. 234. Term expires March 30, 1925.

[fol. 44] In Supreme Court, Queens County

[Title omitted]

Notice of Trial.

Please to take notice that the issues of law and fact in this action will be brought to trial, and an inquest taken therein, at a Trial Term of the Court appointed to be held in and for the County of New York at the County Court House in Borough of Queens, situated in Long Island City, on the first Monday of October, 1923, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Nathan Burkan, Attorney for Plaintiff. Office and Post Office address: 1451 Broadway, New York City, Manhattan Borough.

To Myron Sulzberger, Esq., Attorney for Defendant, No. 565 Fifth Avenue, New York City.

Dated the 20th day of June, 1923.

Filed, May 16, 1925. Edward W. Cox, Clerk.

Compared. Maher and Murray.

[fol. 45] Admission of Service of Notice of Trial

Service of a notice, of which the within is a copy, admitted this 22nd day of June, 1923.

Myron Sulzberger, Attorney for Defendant.

In Supreme Court, Queens County

[Title omitted]

Minutes of Inquest

Inquest Taken in Trial Term, Part I, of the Supreme Court of Queens County, Before Honorable James C. Cropsey, Justice, Presiding, on the 15th Day of May, 1925

[fol. 46] Appearances:

Nathan Burkan for the plaintiff (Louis D. Frohlich, of counsel).

Defendant not appearing.

Direct examination by Louis D. Frohlich:

Q. What is your name?

A. Edward Margolies.

Q. Where do you reside?

A. At No. 30 Hamilton Place, Borough of Manhattan, City of New York.

Q. Are you the plaintiff in this case?

A. I am.

Q. What is your business, Mr. Margolies?

A. I am a builder and general contractor and have been engaged in said business for upwards of twenty-five years.

Q. Do you know the defendant, Morosco Holding Company, Inc.?

A. I do.

Q. What business was the defendant engaged in in 1922?

A. It was engaged in the business of owning and operating theatres in various parts of the United States and in producing plays, and generally engaged in conducting various theatrical enterprises, including the construction, operation and management of theatres.

Q. Mr. Margolies, I show you this paper and ask you whether you recognize the signature at the foot thereof?

A. I do.

Q. Who is George R. Bentzel?

A. He was the vice-president on December 18th, 1922, of the Morosco Holding Company, Inc., the defendant in this action.

Q. Are you familiar with his signature?

A. Yes.

Q. This is his signature (pointing to paper)?

[fol. 47] A. Yes. I was there when he signed it. It was signed in my presence.

Q. Directly underneath his signature is another signature?

A. Yes. It is my signature. I also signed it in Mr. Bentel's presence on the date mentioned in the contract.

Q. Do you recognize the signatures of E. V. Giroux and Eugene H. De Rosa, who signed as witnesses?

A. I do.

Mr. Frohlich: I offer this paper in evidence.

(Paper received and marked Exhibit A.)

Q. Was this paper, Exhibit A, delivered to you on or about December 18th, 1922, by Mr. Bentel?

A. It was. We made two copies, and the one that I have offered in evidence is the one that Mr. Bentel gave me. He kept the other one.

Q. What did you do after Exhibit A was executed and delivered?

A. I sent over foremen, some laborers, etc., to start in the preparation of the job of constructing the theatre in Titusville, Pennsylvania.

Q. When did you, if at all, commence the work of actually constructing that theatre in Titusville, Pa., under the contract, Exhibit A?

A. I spent several weeks in going over the ground, in arranging for workmen, labor and materials and for sub-contractors. I commenced the actual work of construction about January 18th, 1923.

Q. This theatre was to be constructed on a plot of ground in Titusville, Pa.?

A. It was. It was to be on Spring Street, running back along Exchange Place, in Titusville, Pa.

Q. Who was the architect on the job?

A. Eugene De Rosa.

[fol. 48] Q. Where is his office?

A. Mr. De Rosa's office is at No. 110 West 40th Street, in the Borough of Manhattan, City of New York.

Q. Mr. De Rosa was the architect for the defendant, Morosco Holding Company, Inc., was he not?

A. Precisely. He was their architect and he was to generally supervise over the job, and on the tenth of each month he was to examine and approve my requisitions and these requisitions were then to be presented by me to the defendant for payment, according to the terms of the contract.

Q. Under the contract were you obliged to carry Workmen's Compensation Insurance for your workmen?

A. I was, and I was obliged to pay insurance premiums on such insurance.

Q. Were you personally present during the construction of this theatre?

A. I was. I went to the premises at least once a week and saw that everything was being done according to the contract. In addition to that, I had my own personal superintendent, Mr. Ladley, remain on the premises constantly and take care of the job and also take care of all the details connected with it under my general supervision.

Q. I show you this paper, dated April 5th, 1923, and ask you whether you recognize the signature thereon?

A. I do. It is signed in my own handwriting and it is marked "O. K. to pay $6,413.64, $4,923.00, E. De Rosa," in the handwriting of Mr. De Rosa, the defendant's architect on this job.

Q. Is this paper a requisition presented by you, pursuant to the contract?

A. It is and was approved by Mr. De Rosa, after Mr. De Rosa had gone over the job and satisfied himself that all the terms thereof were true and correct.

[fol. 49] Mr. Frohlich: I offer this paper in evidence.

(Paper received in evidence and marked Plaintiff's Exhibit B.)

Q. Look at Plaintiff's Exhibit F. "Amount of work done to date, $5,132.86." What does that mean?

A. It means that I expended for material, time and labor the sum of $5,132.86, in the construction of the foundation for the theatre.

Q. I show you the next item, $1,400. What does that stand for?

A. That stands for insurance premiums that I was compelled to pay to carry Workmen's Compensation Insurance on the job. I employed as many as forty or forty-five men, on the average.

Q. Who made the computations, with respect to profit and overhead?

A. The office of the defendant and Mr. De Rosa, the defendant's architect.

Q. The 5 per cent. overhead was part of your cost of construction work included in that requisition?

A. Yes.

Q. And the profit of 10 per cent. constituted part of the value of the construction work included in that requisition?

A. Yes.

Q. In other words, according to this requisition, you were entitled to receive on April 5th, 1923, from the defendant 85 per cent. of the sum of $7,545.46, amounting to $6,413.64?

A. I was.

Q. Did you present this requisition to the defendant?

A. I presented this requisition to Mr. Bentel, the vice-president of the defendant, and asked him for payment and he refused to give it to me. He said that I would have to wait a few days, because Mr. August Janssen, who was the president of the defendant would have to sign the check and he was not available just then.

[fol. 50] Q. In the meantime, while you were waiting for your money, did you continue with the construction of this theatre under your contract?

A. Yes, I did. I continued the construction of the theatre and continued to pay for the insurance and to do all that was necessary to carry out my contract.

Q. I show you this paper, dated May 10th, 1923, and ask you whether you recognize the signature thereon?

A. I do. It is signed in the handwriting of my secretary, pursuant to my instructions, and it is marked "O. K., Eugene De Rosa."

Q. The signature is that of the defendant's architect?
A. It was signed by him in my presence.

Mr. Frohlich: I offer this paper in evidence.

(Paper received in evidence as Plaintiff's Exhibit C.)

Q. After this paper was signed by the architect, what did you do with it?

A. I presented it to Mr. Bentel and to Mr. Janssen personally, at the office of the Morosco Holding Company, Inc., in New York City. Mr. Bentel and Mr. Janssen were in the room. I walked in and gave them this requisition and I told them that the architect had approved it and stated that I had not received my money on the first requisition. Mr. Janssen stated that he would let me have the money in a day or two as the defendant was a bit pressed for cash.

Q. I call your attention to this requisition and ask you what the amount of work done to date, to wit, $28,340, represents?

A. It means the money I had to pay in the construction of this theatre from the date of the first requisition down to May 10th, 1923.

[fol. 51] Q. What is the item $2,800?

A. It represents insurance premiums paid by me in maintaining Workmen's Compensation Insurance.

Q. The items represented by 10 per cent. profit and 5 per cent. overhead were figured in by whom?

A. By Mr. De Rosa himself.

Q. In addition to the sum $31,340 there was still due and owing to you at that time the amount of the first requisition?

A. There was. That amounted to $6,413.64.

Q. The 5 per cent. overhead was part of your cost of the construction work included in that requisition?

A. Yes.

Q. And the profit of 10 per cent. constituted part of the value of the construction work included in that requisition?

A. Yes.

Q. 85 per cent. of the sum due you on the second requisition was $29,651.64?

A. Yes.

Q. Were you able to go on with the work of construction of that theatre after May, 1923?

A. I was not. I could not pay my men, and I could not pay for materials.

Q. How many years have you been a builder and contractor in the erection of theatres?

A. For over fifteen years.

Q. Have you built many theatres?

A. Yes. I constructed the Plymouth, Broadhurst, Morosco, Bijou, 48th Street, Ambassador, Jolson, Ritz and 49th Street theatres.

Q. You are familiar with the cost of materials, labor and other items going into the construction of theatres?

A. Yes.

Q. If you had been permitted to complete the construction of this theatre in Titusville, Pennsylvania, what would have been the total cost of construction of the same?

A. The total value of the construction work of that theatre would have been $172,000. That sum would include as [fol. 52] part of the value of such construction work a profit of 10 per cent., amounting to $17,200. The sum of $3,607.30 was included in the two requisitions, leaving a balance of $13,592.70, which represents the actual profit that I would have made on the remainder of the work if I had been permitted to complete the same.

Q. Now, the total of the sums in the first cause of action is $36,065.18?

A. Yes.

Q. And the balance of the profits that you would have made is $13,592.70?

A. Yes.

Q. Have you computed the interest on these sums from June 10th, 1923?

A. Yes. The interest is $5,697.65.

Q. What is the total amount due you from the defendant?

A. $55,145.53.

Q. Have you demanded payment from the defendant?

A. I have and I have received nothing.

Q. You demand judgment for $55,145.53?

A. Yes.

Edward Margoles.

Sworn to before me in open court this 15th day of May, 1925. John J. Moran, Special Deputy Clerk, Supreme Court, Queens County, N. Y.

[fol. 53] Louis D. Frohlich, a witness called on behalf of the plaintiff, being first duly sworn, deposes and says:

Direct examination by witness in person:

Q. What is your name and occupation?

A. I am an attorney at law, licensed to practice in the State of New York, and reside at No. 535 West 155th Street, in the Borough of Manhattan, City of New York. I am associated in the practice of law with Nathan Burkan, Esq., who is the attorney of record for the plaintiff in this action and have been associated with Mr. Burkan for upwards of nine years.

Q. Are you familiar with the history of this action?

A. I am. I have had charge of the case from its inception.

Q. When was the matter commenced?

A. This action was commenced in this court in May, 1923. After the service of a summons and complaint upon the defendant, one John Martin Richle was appointed receiver of the defendant in an equity action brought by one Robert L. Hatch against this defendant in the United States District Court for the Southern District of New York. Thereafter, a resettled order was made in the Federal Court, confirming the receivership and making the same permanent during the pendency of that suit, and also staying this plaintiff from continuing with the prosecution of this suit in this court. Thereafter, bankruptcy proceedings were instituted in the United States District Court against this defendant by involuntary petition, but the said petition was subsequently dismissed. Thereafter, this plaintiff moved in the said Federal Court to vacate the stays contained in the or-[fol. 54] ders appointing the receiver, on the ground that the Federal Court had no jurisdiction to make any such orders and to grant any such stays, by reason of the fact that this suit had been commenced in this court, the State

Court, prior to the suit commenced in the Federal Court. The motion came on before Judge Winslow and was denied. An appeal was thereafter taken by this plaintiff to the United States Circuit Court of Appeals for the Second Circuit, and Judge Winslow's order was reversed and the stays were vacated, giving this plaintiff the right to continue the prosecution of this suit to judgment, with the proviso, however, that any judgment obtained in this suit would not necessarily be binding upon the receiver in the Federal suit or upon any Special Master acting upon any claims presented in that suit. I thereupon moved in this court to restore this case to the day calendar for trial, and on April 21st, 1925, Mr. Justice William F. Hagarty made an order granting the plaintiff's motion to reinstate and restore this case, and the case was thereupon added to the calendar of this court for Monday, May 4th, 1925.

I offer in evidence a copy of the order of Mr. Justice William Hagarty, restoring this case, with due proof of service of such order upon F. Wright Moxley, Esq., solicitor for Robert L. Hatch, the plaintiff in the Federal suit, and John Martin Riehle, Esq., receiver of the defendant herein, and also showing on the back thereof the admission of service of Myron Sulzberger, Esq., the attorney of record for the defendant in this action.

(Received in evidence as Exhibit D.)

[fol. 55] Q. Did you do anything else to notify the defendant or any of the parties interested in the defendant, of the restoration of this case to the day calendar of this court?

A. I did. I prepared a formal notice to the effect that this case had been restored to the day calendar for trial for Monday, May 4th, 1925, and that same would be tried.

Q. Did you serve that notice upon the defendant?

A. I served the notice upon defendant's attorney, Myron Sulzberger, Esq., and upon F. Wright Moxley, solicitor for Robert L. Hatch, in the Federal Court, and also on John Martin Riehle.

I offer in evidence the notice of restoration and trial, together with an affidavit of service thereof of David Greenstein, showing personal service of a copy of said notice on F. Wright Moxley, solicitor for Robert L. Hatch, and

John Martin Riehle, receiver of the defendant herein, and also showing admission on the back of such notice of Myron Sulzberger, Esq., attorney for the defendant herein.

Louis D. Frohlich.

Sworn to before me in open court this 15th day of May, 1925. John J. Moran, Special Deputy Clerk, Supreme Court, Queens County, N. Y.

Filed, May 16, 1925. Edward W. Cox, Clerk.

The plaintiff rests.

Compared. Maher and Murray.

[fol. 56] In Supreme Court, Queens County

[Title omitted]

Order Restoring Case to Calendar for Trial—April 21, 1925

Plaintiff having moved to reinstate this case upon the trial calendar of this court for trial, and said motion having come on to be heard on the 21st day of April, 1925,

Now, on reading the notice of motion dated April 15, 1925, the affidavit of Edward Margolies, together with the exhibits annexed thereto, verified April 14th, 1925, together with due proof of service of said papers, and the pleadings herein, all submitted in support of said motion, and after hearing Nathan Burkan, Esq., of counsel for the [fol. 57] plaintiff, in support of said motion, and no one appearing in opposition thereto, and due deliberation having been had thereon, and it being shown to the satisfaction of the Court that the stay of the United States District Court for the Southern District of New York, restraining the further prosecution of this action, has been vacated,

Now on motion of Nathan Burkan, Esq., attorney for the plaintiff, it is

Ordered that said motion be and the same hereby is in all respects granted.

Ordered further that this case be restored to the day calendar for trial for Monday, May 4th, 1925, and the Clerk of this court is hereby instructed to place the same upon the calendar for that date.

Enter.

W. P. H., Justice Supreme Court.

Granted April 21st, 1925. Edward W. Cox, Clerk.

Filed April 22, 1925.

[fol. 38] In Supreme Court, Queens County

[Title omitted]

Affidavit of Service of Papers Generally

State of New York,
City of New York,
County of New York, ss:

David Greenstein, being duly sworn, deposes and says:

That he is over the age of twenty one years.

That on May 1st, 1925, at No. 68 William Street, in the Borough of Manhattan, City of New York, he served the foregoing order restoring case with notice of entry upon F. Wright Mosley, Esq., solicitor for Robert L. Hatch and John Martin Riehle, Esq., trustee of the defendant herein, by delivering to and leaving personally with Mr. A. F. Peters, who is associated with the said F. Wright Mosley, Esq., and who is of suitable age and discretion and who was in charge of said office on said day, a true copy thereof; deponent further says that he knew the person so served [fol. 39] as aforesaid to be the person mentioned and described as the solicitor for said Robert L. Hatch and John Martin Riehle, trustee.

David Greenstein.

Sworn to before me this 1st day of May, 1925.
Lillian Irene Fish, Notary Public, New York Co.
Clerk's No. 68. Reg. No. 3062. Certificate filed in Bronx County. Clerk's No. 12. Register's No. 2750. Commission expires March 30, 1927.

Filed May 16, 1925. Edward Cox, Clerk.

Compared. Maher and Murray.

[fol. 60] In Supreme Court, Queens County

[Title omitted]

Answer—Filed May 16, 1925

The defendant above named by Myron Sulzberger, its attorney, answers the complaint herein as follows:

As to the First Cause of Action

I. It admits that on or about January 18th, 1923, plaintiff caused the work of construction of the theatre and business building to be begun, and except as aforesaid, it denies each and every allegation set forth in paragraph "Fourth" of the complaint.

II. It denies that it has any knowledge or information sufficient to form a belief as to whether the plaintiff presented an itemized requisition to the architect, Eugene De Rosa, and that said requisition was duly approved in writing by said architect, and it denies each and every other allegation set forth in paragraph "Fifth" of the complaint.

[fol. 61] III. On information and belief, it denies each and every allegation set forth in paragraph "Sixth" of the complaint.

IV. It denies that it has any knowledge or information sufficient to form a belief, as to whether the plaintiff presented a requisition to the architect, Eugene De Rosa, for the amount of $29,951.54, and that said architect duly approved and certified said requisition in writing; and the defendant denies all the remaining allegations contained in paragraph "Seventh" of the complaint.

V. It denies each and every allegation contained in paragraph "Eighth" of the complaint.

VI. It denies each and every allegation contained in paragraph "Ninth" of the complaint.

VII. It denies each and every allegation contained in paragraph "Tenth" of the complaint.

As to the Second Cause of Action

VIII. It repeats the denials hereinbefore set forth to paragraph "Fourth," "Fifth," "Sixth," "Seventh," "Eighth," "Ninth" and "Tenth" of the complaint in the same manner and to the same effect as therein set forth, and with the same force and effect as though the same were more fully and at length repeated herein.

IX. It denies that it has any knowledge or information as to any of the allegations set forth in paragraph "Twelfth" of the complaint, sufficient to form a belief thereof.

X. It denies that it has any knowledge or information as to any of the allegations set forth in paragraph "Thir-[fol. 62] teenth" of the complaint, sufficient to form a belief thereof.

As a separate and distinct defense and counterclaim to the first and second causes of action set forth in the complaint and to the whole thereof, the defendant further alleges:

XI. That on or about December 18th, 1922, the plaintiff and the defendant entered into the agreement set forth in paragraph "Second" of the complaint, a copy of which is thereto annexed and marked "Exhibit A," in and by which the plaintiff for the sum of $172,880.00 agreed to erect a theatre and business building on the defendant's premises located on Spring Street, running back along Exchange Place, in Titusville, in the State of Pennsylvania, according to certain drawings, specifications and addenda therein more particularly mentioned and described. That in and by said agreement the plaintiff agreed, in Section 6 of said agreement, to complete the several portions and the whole of the work comprehended therein on or before the 15th day of June, 1923; that on or before the 15th day of June, 1923, the plaintiff wholly abandoned said work and refused on his part to keep and perform the terms of the said agreement and refused any longer to be bound thereby; that

the said abandonment of said work and the refusal of the said plaintiff to complete and carry out and perform the terms and provisions of said agreement on his part to be kept and performed, were not caused by or the result of any of the exceptions contained in any of the provisions of the said agreement, which would justify the abandonment of said work of said contract on the part of the plaintiff, or occasion delay in the performance of the contract on the [fol. 63] part of the plaintiff and for which the plaintiff would be entitled to an extension of time to perform his said agreement.

XII. That by reason of the abandonment of the said work by the plaintiff and his refusal to complete the said agreement on his part, the defendant has been damaged in the sum of $150,000.00, which said sum the defendant counterclaims and asks that said sum be set off as against any sum to which the plaintiff may seem entitled.

Wherefore defendant demands judgment that the complaint herein be dismissed, and that it have judgment against the plaintiff for the sum of One Hundred Fifty Thousand Dollars ($150,000.00) the amount of its counterclaim or that said sum be set off as against any sum to which the plaintiff may otherwise seem to be entitled, besides the costs and disbursements of this action.

Myron Sulzberger, Attorney for Defendant. Office & P. O. Address: No. 565 Fifth Avenue, Borough of Manhattan, New York City.

[fol. 64] *Duly sworn to by George R. Bentel. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 65] In Supreme Court, Queens County

[Title omitted]

Reply—Filed May 16, 1925

The plaintiff herein, by Nathan Burkan, his attorney, for his reply to the counterclaim contained in the defendant's answer:

1. Denies so much of Paragraph XI of said answer which alleges that on or before the 15th day of June, 1923, the plaintiff wholly abandoned said work and refused on his part to keep and perform the terms of the said agreement and refused any longer to be bound thereby; that the said abandonment of said work and the refusal of the said plaintiff to complete and carry out and peform the terms and provisions of said agreement on his part to be kept and performed, were not caused by or the result of any of the exceptions contained in any of the provisions of the said agreement, which would justify the abandonment of said work or said contract on the part of the plaintiff, or occasion delay in the performance of the contract on the [fol. 66] part of the plaintiff and for which the plaintiff would be entitled to an extension of time to perform his said agreement.

2. Denies each and every allegation contained in Paragraph XII of said answer.

Wherefore plaintiff demands judgment dismissing said counterclaim, and for affirmative judgment as prayed for in the complaint.

Nathan Burkan, Attorney for Plaintiff. Office & P. O. Address: 1451 Broadway, Borough of Manhattan, New York City.

[File endorsement omitted.]

Compared. Maher and Murray.

[fol. 67] Duly sworn to by Edward Margolies. Jurat omitted in printing.

[fol. 68] In Supreme Court, Queens County

[Title omitted]

Notice of Trial.

Sirs: Please take notice that the above entitled action has been restored to the Day Calendar for trial for Monday, May 4th, 1925, and that the issues in this action will

be brought on for trial on that day and an inquest taken therein at a Trial Term, Part I, appointed to be held in and for the County of Queens, at the County Court House, in Long Island City, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, and you and each of you are hereby directed to appear on that day to participate in the trial of said action.

Yours, etc., Nathan Burkan, Attorney for Plaintiff. Office & P. O. address: No. 1451 Broadway, Borough of Manhattan, City of New York.

Dated New York, April 29th, 1925.

[fol. 69] To F. Wright Moxley, Esq., Solicitor for Robert L. Hatch and John Martin Riehle, Esq., receiver, No. 68 William Street, Borough of Manhattan, New York City; John Martin Riehle, Esq., receiver, No. 68 William Street, Borough of Manhattan, City of New York; Myron Sulzberger, Esq., Attorney for Defendant. Office and P. O. address: No. 565 Fifth Avenue, Borough of Manhattan, New York City.

[fol. 70] In Supreme Court, Queens County

[Title omitted]

Affidavit of David Greenstein

State of New York,
City of New York,
County of New York, ss:

David Greenstein, being duly sworn, deposes and says: That he is over the age of twenty-one years.

That on May 1st, 1925, at No. 68 William Street, in the Borough of Manhattan, City of New York, he served the foregoing notice upon F. Wright Moxley, Esq., solicitor for Robert L. Hatch and John Martin Riehle, Esq., Receiver of the defendant herein, by delivering to and leaving personally with Mr. A. F. Paura, who is associated with the said F. Wright Moxley, Esq., and who is of suita-

ble age and discretion and who was in charge of said office on said day, a true copy thereof; deponent further says that he knew the person so served as afore said to be the [fol. 71] person mentioned and described as the solicitor for said Robert L. Hatch and John Martin Riehle, Receiver.

David Greenstein.

Sworn to before me this 11th day of May, 1925. Lillian Irene Fink, Notary Public, New York Co. Clerk's No. 61 Reg. No. 7052. Certificate filed in Bronx County. Clerk's No. 12 Register's No. 2750. Commission expires March 30, 1927.

Filed May 16, 1925. Edward W. Cox, Clerk.

Compared. Maher and Murray.

[fol. 72] In Supreme Court, Queens County

[Title omitted]

Findings of Fact and Conclusions of Law—Filed May 16, 1925

This action having come on for trial before me at Trial Term, Part I of this court, on the 15th day of May, 1925, and the defendant not having appeared, and an inquest having been taking by me without a jury, and this Court having heard and considered the proofs and evidence offered by the plaintiff, I do make and find the following facts and conclusions of law:

Findings of Fact

1. That at all the time hereinafter mentioned, the defendant was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware.

2. That plaintiff is a builder and general contractor and has been engaged in that business for upwards of twenty-

[fol. 73] five years and has constructed many theatres in the City of New York and elsewhere.

3. That on or about the 18th day of December, 1922, plaintiff and defendant entered into a contract in writing, wherein and whereby the plaintiff agreed to furnish all the materials and perform all the work in the erection af a theatre and business building to be erected on Spring Street and running back along Exchange Place, in the City of Titusville, State of Pennsylvania, in accordance with certain drawings and specifications and general conditions, and to complete the same on or before June 15, 1923, at a cost to the defendant not to exceed $172,000.00.

4. That in and by said agreement it was provided that payments to the plaintiff were to be made on or about the 10th day of each month for 85% of the work and materials on the job, and that proper itemized requisitions were to be presented by the plaintiff on or about the first day of each month to the architect mentioned in said contract, said architect being one Eugene De Rosa of 110 West 40th Street, New York City.

5. That on or about January 18, 1923, plaintiff caused the work of construction of said theatre and business building to be begun, and caused the foundation of such structure to be excavated and laid and the brick work on said building to be erected, and caused other work, labor and services to be rendered thereon and materials furnished in connection therewith, so that up to April 5, 1923, plaintiff had performed or caused to be performed work, labor and services, and had paid insurance premiums, and had fur-[fol. 74] nished materials in the erection of said building, of the fair and reasonable value of $7,545.46.

6. Plaintiff thereupon presented an itemized requisition to the said architect, Eugene De Rosa, on or about April 5, 1923, for said amount of $7,545.46, and said requisition was duly approved in writing by said architect, and plaintiff presented such requisition, duly approved, on April 10, 1923, to the defendant herein and demanded payment of 85% of said sum of $7,545.46, to wit, the sum of $6,413.64, and the defendant failed and refused to pay the same or any part thereof.

7. That plaintiff continued in the performance of said work under said contract after April 5, 1923, and furnished or caused to be furnished work, labor, services and materials in the construction of the said building, and paid insurance premiums thereon down to May 1, 1923, of the fair and reasonable value of $36,197.00.

8. That thereupon, and on or about the 10th day of May, 1923, plaintiff presented a requisition to the said architect, Eugene De Rosa, for the aforesaid amount of $36,197.00, and that said architect duly approved and certified said requisition in writing, and plaintiff thereupon and on or about the 16th day of May, 1923, presented said requisition to the defendant herein and demanded payment of 85% of said sum of $36,197.00, to wit, the sum of $29,651.54, and the defendant then and there failed and refused to pay said sum or any part thereof.

9. That plaintiff has duly performed said contract and each and every term, condition and covenant thereof on his [fol. 75] part to be performed, except in so far as he was prevented from such performance by the acts of defendant, and plaintiff was ready, willing and able to continue to perform the said contract.

10. That it was within the contemplation of this contract that the payments thereon would be made monthly as required therein, in order that the plaintiff would be enabled to pay for the work, labor and services rendered and materials furnished on the job, and that without receiving such payments as and when the same became due, plaintiff has been unable to continue to pay for the work, labor and services rendered and materials furnished thereunder.

11. That the total value of the construction work of the said theatre in Titusville, Pennsylvania, would have been $172,00.00, which sum would include, as part of the value of such construction work, a profit of 10%, amounting to $17,200.00.

12. That if the plaintiff had been permitted to continue the completion of the said theatre, pursuant to said contract, the profit that plaintiff would have made, in addition to the profit set forth and itemized in the first and second requisition, would have amounted to $13,392.70.

13. That the plaintiff has suffered damage in the sum of $36,065.18, being the sums to which he would be entitled under the first and second requisitions, and the sum of $13,-392.70, being the balance of the profits he would have made, making a total of $49,457.88.

14. That the interest on said sum of $49,457.88 from June [fol. 76] 10, 1923, down to the date hereof, amounts to $5,687.65, and the total amount of damage suffered by the plaintiff, including loss of interest, is the sum of $55,145.53.

15. That this action was commenced in May, 1923, by the service of a summons and verified complaint upon the defendant, and that the defendant appeared herein by Myron Sulzberger, its attorney, and that thereafter one John Martin Riehle was appointed Receiver of the defendant in an equity action brought by one Robert L. Hatch against said defendant in the United State District Court for the Southern District of New York.

16. That thereafter a resettled order was made in the said Federal Court, confirming the receivership and making the same permanent during the pendency of the suit therein, and also staying this plaintiff from continuing with the prosecution of this suit in this court.

17. That thereafter bankruptcy proceedings were instituted in the United States District Court against this defendant by involuntary petition, and said petition was subsequently dismissed, and this plaintiff moved in said Federal Court to vacate the stays contained in the orders appointing the Receiver on the ground that the Federal Court had no jurisdiction to make any such orders and to grant any such stays by reason of the fact that this action had been commenced in the State Court prior to the action commenced in the Federal Court; that the motion came on before Judge Winslow and was denied; that an appeal was taken by this plaintiff to the United States Circuit Court of Appeals for the Second Circuit, and Judge Winslow's [fol. 77] order was reversed and the stays were vacated, giving this plaintiff the right to continue the prosecution of this suit to judgment.

18. That plaintiff moved in this court to restore this case to the day calendar for trial, and on April 21, 1925, an order was made in this court granting the plaintiff's motion to reinstate and restore this case, and the case was thereupon added to the calendar of this court for Monday, May 4, 1925, and that a copy of the order of this court restoring this case, with notice of entry, was served upon F. Wright Moxley, Esq., solicitor for Robert L. Hatch, the plaintiff in the federal suit, and on John Martin Riehle, Receiver of the defendant herein in said federal suit, and also on the attorney for the defendant herein, Myron Sulzberger, and that formal notice of the restoration of this case to the day calendar for Monday, May 4, 1925, was served in addition thereto upon said Myron Sulzberger, F. Wright Moxley and John Martin Riehle.

Conclusions of Law

I. That by reason of the failure of the defendant to pay to the plaintiff 85% of the sum due under the first requisition, to wit, $6,413.64, and by reason of the failure of the defendant to pay to the plaintiff 85% of the sum due to the plaintiff under the second requisition, to wit, the sum of $29,651.54, the defendant committed an essential breach of its contract with the plaintiff, and repudiated its contract with the plaintiff, and that by reason of such breach and repudiation on the part of the defendant, the plaintiff has been prevented from further performance of said contract [fol. 78] on his part, and will continue to be prevented from any further performance of said contract on his part.

II. That the plaintiff is entitled to recover of the defendant the sum of $36,065.18, as represented by the first and second requisitions.

III. That plaintiff is entitled to recover of the defendant the profits which he would have earned under the said contract had he been permitted to complete the same, which profits, in addition to so much of the same as are included in the first and second requisitions, amount to $13,392.70.

IV. The plaintiff is entitled to recover interest on said sums of $36,065.18 and $13,392.70 from the 10th day of June, 1923, which interest amounts to $5,687.65.

V. That plaintiff is entitled to recover judgment against the defendant of the aforesaid sums of $36,065.01 and $13,-392.70 and $5,687.65, making a total amount of $55,145.53, and to have execution therefor.

And I hereby direct that judgment be entered in favor of the plaintiff, Edward Margolies, and against the defendant, Morosco Holding Company, Inc., in the sum of $55,145.53, together with costs to be taxed, and that the plaintiff have execution therefor.

Cropsey, J. S. C.

Dated May 15, 1925.

[File endorsement omitted.]

Compared. Maher and Murray.

[fol. 79] AGREEMENT

This agreement, made the eighteenth day of December in the year one thousand nine hundred and 22 by and between Edward Margolies of 19 East 33rd Street, New York City, party of the first part (hereinafter designated the Contractor) and The Morosco Holding Co., Inc., of 217 West 45th St., New York City, party of the second part (hereinafter designated the Owner).

Witnesseth that the Contractor, in consideration of the agreements herein made by the Owner, agree with the said Owner as follows:

Section 1. The Contractor shall and will provide all the materials and perform all the work for the theatre and business building to be erected on Spring Street running back along Exchange Place, Titusville, Pa., in accordance with drawings, Sheets #1 to 18, inclusive and specification pages #1 to 80 inclusive, and also general conditions pages A to D inclusive, and addenda.

All temporary heating and lighting is included in this contract, anything else to the contrary nothwithstanding as shown on the drawings and described in the specifications prepared by Eugene De Rosa, of 110 West 40th Street, New

York City, Architect, which drawings and specifications are identified by the signatures of the parties hereto, and become hereby a part of this contract.

Section 2. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said Architect, and [fol. 80] that his decision as to the true construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explanations as may be necessary to detail and illustrate the work to be done are to be furnished by said Architect, and they agree to conform to and abide by the same so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in Section 1.

It is further understood and agreed by the parties hereto that any and all drawings and specifications prepared for the purposes of this contract by the said Architect are and remain his property, and that all charges for the use of the same, and for the services of said Architect, are to be paid by the said Owner.

Section 3. No alterations shall be made in the work except upon written order of the Architect; the amount to be paid by the Owner or allowed by the Contractor by virtue of such alterations to be stated in said order. Should the Owner and Contractor not agree as to amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree, the determination of said amount shall be referred to arbitration as provided for in Section 12 of this contract.

Section 4. The Contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the Architect or his authorized representatives, shall, within twenty four hours after receiving written notice from the Architect to that effect, proceed to remove [fol. 81] from the grounds or buildings all materials condemned by him, whether worked or unworked, and to take down all portions of the work which the Architect shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifi-

cations, and shall make good all work damaged or destroyed thereby.

Section 5. Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect, the Owner shall be at liberty, after three days' written notice to the Contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractor shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the [fol. 82] Owner in finishing the work, such excess shall be paid by the Owner to the Contractor; but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architect, whose certificate thereof shall be conclusive upon the parties.

Section 6. The Contractor shall complete the several portions and the whole of the work comprehended in this Agreement by and at the time or times hereinafter stated, to wit: On or before June 15th, 1927.

The Contractor shall, during the progress of the work and the life of this contract, at his own expense, provide and maintain insurance to hold the Owner free and harmless from any damage or loss sustained by any workman or workmen, person or persons; occasioned by the work or erection of this building or by the performance of this contract. The policies shall be issued by a reliable company and be made payable to the parties hereto as their interests may appear.

Any delay in the performance of this contract by the Contractor occasioned by strikes, fire or acts of God shall not be a breach of or a non-compliance with the terms herein.

In the absence of special plans, it is mutually agreed that this contractor will run the plumbing and drainage pipes in basement in a manner satisfactory to the Architect and the authorities having jurisdiction, to comply with existing conditions on the premises and all local and State laws.

[illegible] Section 7. Should the Contractor be delayed in the prosecution or completion of the work by the act, neglect or default of the Owner, of the Architect, or of any other contractor employed by the Owner upon the work, or by any damage caused by fire or other casualty for which the Contractor is not responsible, or by combined action of workmen so as not caused by or resulting from default or collusion on the part of the Contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, which extended period shall be determined and fixed by the Architect; but no such allowance shall be made unless a claim therefor is presented in writing to the Architect within forty eight hours of the occurrence of such delay.

Section 8. The Owner agrees to provide all labor and materials connected to the conduct of this work not included in this contract in such manner as not to delay its progress, and in the event of failure so to do, thereby causing loss to the Contractor, agrees that [illegible] will reimburse the Contractor for such loss; and the Contractor agrees that if [illegible] shall delay the progress of the work so as to cause loss for which the Owner shall become liable, then [illegible] shall reimburse the Owner for such loss. Should the Owner and Contractor

fail to agree as to the amount of loss comprehended in this Section, the determination of the amount shall be referred to arbitration as provided in Section 12 of this contract.

Section 9. It is hereby mutually agreed between the par- [fol. 86] ties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shall be not in excess of $172,000.00 to complete the building as intended by the specifications and drawings. This amount hereby includes any extra work which may be necessary to complete the building in harmony with the plans and specifications and the conditions found on the premises, but does not include any radical changes or additions that the Owner might desire which are beyond the scope and intention of the plans and specifications as drawn. It is hereby mutually agreed between the parties that should the Owner, architect or contractor effect any saving in the construction of this building below the stated amount herein fixed, such saving being effected by substitutions, omissions or modifications, and same being approved by architect, that in that event the owner and contractor shall share equally in the amount thus saved below the maximum amount of this contract.

The contractor personally guarantees to complete the building in accordance with the plans and specifications herein mentioned for the maximum of one hundred seventy-two thousand dollars ($172,000.00), and that the owner is relieved of any obligation to pay more than this amount subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the Owner to the Contractor, in current funds, and only upon certificates of the Architect, as follows:

Payments to the contractor shall be made on or about the 20th day of each month for 85% of the work and materials on the job. Proper itemized requisitions shall be presented to the Architect by the Contractor on or about the first day of each month.

[fol. 87] The Owner reserves the right to require from the contractor, from time to time, satisfactory evidence that all workmen, subcontractors, materialmen, etc., are being paid on this operation by the Contractor and a satisfactory accounting shall be furnished the Owner whenever

requested, stating amounts received, amounts paid out and obligations outstanding.

The final payment shall be made within days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued. If at any time there shall be evidence of any lien or claim for which, if established, the Owner of the said premises might become liable, and which is chargeable to the Contractor, the Owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify against such lien or claim. Should there prove to be any such claim after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the Contract or default.

Section 10. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

Section 11. The Owner shall during the progress of the [fol. 86] work maintain insurance on the same against loss or damage by fire, or flood, the policies to cover all work incorporated in the building, and all materials for the same in or about the premises and to be made payable to the parties hereto, as their interest may appear.

Section 12. In case the Owner and Contractor fail to agree in relation to matters of payment, allowance or loss referred to in Sections 3 or 8 of this contract, or should either of them dissent from the decision of the Architect referred to in Section 7 of this contract, which dissent shall have been filed in writing with the Architect within ten days of the announcement of such decision, then the matter shall be referred to a Board of Arbitration to consist of one person selected by the Owner, and one person selected by the Contractor, these two to select a third. The

decision of any two of this Board shall be final and binding on both parties hereto. Each party hereto shall pay one-half of the expense of such reference.

It is hereby understood and this contractor hereby represents that he is fully covered with proper Liability, Accident and Workmen's Compensation Insurance in responsible and acceptable companies and that this contractor hereby agrees to fully indemnify and hold the owners and all other parties and contractors free and harmless from any claim or damages arising through any cause by virtue of the performance of this contract. This contractor further agrees to deliver to the owners within 3 days from the date of the contract proper evidence of the carrying of such insurance.

The said parties for themselves, their heirs, successors, [fol. 87] executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written.

The Morosco Holding Co., Inc., by Geo. R. Bentel, Vice Pres. Edward Margolies, by Edw. Margolies. (Seal of Morosco Holding Co., Inc.)

In presence of E. V. Giroux, Eugene Delph.

[fol. 88] Requisition

Edward Margolies, Real Estate, 19 East 33d Street, New York

Telephone 5450 Murray Hill

April 5th, 1923.

Eugene De Rosa, Esq., #110 West 40th Street, New York City.

Dear Sir: I hereby make following requisition for payment on job #210, Titusville, Pennsylvania, excavating,

foundation and footings, in the amount of $6,413.64, being 85% of the work done as listed below:

Amount of work done to date	$5,132 86
Insurance	1,400 00
	6,532 86
10% profit	653 30
	7,186 16
5% overhead	359 30
	$7,545 46
85% of this requisition	$6,413 64
15% retained	1,131 86

Yours very truly, (Signed) Edw. Margolies.

EM:LC.

O. K. to pay $6,413.64. 4/9/23. (Signed) Eugene De Rosa.

[fol. 89] Requisition

Edward Margolies, Real Estate, 19 East 53d Street, New York

Telephone 5450 Murray Hill

May 10th, 1923.

Eugene De Rosa, Esq., #110 West 40th Street, New York City.

Dear Sir: I hereby make following requisition for payment on job #210, Titusville, Pennsylvania, excavating foundation and footings, in the amount of $28,540.00, being 85% of the work done as listed below:

Amount of work done to date	$28,540 00
Insurance	2,800 00
	31,340 00
10% profit	3,134 00
	34,474 00
5% overhead	1,723 00
	36,197 00

15% retained	5,429 55
85% of this requisition	30,767 45
1st requisition	6,413 64
Due	24,353 81

Yours very truly, (Signed) Edw. Margolies.

EM:LC.

O. K. (Signed) Eugene De Rosa. May 24, 1923.

Filed May 16, 1925. Edward W. Cox, Clerk.
Compared. Maher and Murray.

[fol. 90] In Supreme Court, Queens County

[Title omitted]

Bill of Costs

Costs of Plaintiff

Costs before Notice of Trial	$25 00
Costs after Notice of Trial	15 00
Trial Fee, Issue of Fact	30 00
Examination of Party before Trial	10 00
Term Fees	50 00
	$130 00
Disbursements	8 35
Total	$138 35

Disbursements

Clerk's Fees on Entering Judgment	$2 00
Serving Copy, Summons and Complaint on Defendant	1 50
Satisfaction Piece	50
Transcript and Filing	50

Sheriff's Fees on Execution	2 60
Extract from Minutes	1 25
Total	$8 35

[fol. 91] County of New York,
City of New York, ss:

Louis D. Frohlich, an attorney, associated with Nathan Burkan, the attorney for the plaintiff in the above-entitled action, being duly sworn, says that the foregoing disbursements have been made in said action or may be necessarily made or incurred therein, and that the copies of documents or papers as charged herein were actually and necessarily obtained for use.

Louis D. Frohlich.

Sworn to before me this 15th day of May, 1925. Lillian Irene Fink, Notary Public, New York Co. Clerk's No. 61 Reg. No. 7052. Certificate filed in Bronx County Clerk's No. 12. Register No. 2750. Commission expires March 30, 1927.

[fol. 92] In Supreme Court, Queens County

[Title omitted]

Extract from Minutes—May 15, 1925

The defendant in this action being called, and failing to answer or appearing, on motion of plaintiff's attorney, ordered, that the default of the defendant be and the same is hereby entered;

Whereupon, the pleadings having been examined by the Court, and two witnesses sworn, it is found that the defendant is indebted unto the plaintiff in the sum of $55,145.53 damages.

Ordered, judgment for the plaintiff against the defendant for that amount besides costs.

(Extracts from the Minutes.)

Edward W. Cox, Clerk.

Filed May 16 1925. Edward W. Cox, Clerk.
Compared. Maher and Murray.

[fol. 93] In Supreme Court, Queens County

Edward Margolies, Plaintiff,

against

Morosco Holding Co., Inc., Defendant

Judgment—Field May 16, 1925

The issues in this action having been regularly brought on for trial before Honorable James C. Cropsey, one of the Justices of this court, without a jury, at a Trial Term, Part I thereof, on the 15th day of May, 1925, and the defendant having defaulted and having failed to appear, and the evidence having been adduced by the plaintiff herein, and the Court having made its decision, awarding judgment to the plaintiff and against the defendant in the sum of Fifty-five thousand one hundred and forty-five and 53/100 ($55,-145.53 Dollars, and the plaintiff's costs having been duly taxed in the sum of One hundred thirty-eight and 35/100 Dollars ($138.35),

Now, on motion of Nathan Burkan, attorney for the plaintiff, it is

Ordered, adjudged and decreed that the plaintiff, Edward Margolies, recover of, and have judgment against the defendant, Morosco Holding Co., Inc., in the sum of Fifty-five [fol. 94] thousand one hundred and forty-five and 53/100 ($55,145.53) Dollars, with One hundred thirty-eight 35/100 ($138.35/100) Dollars costs, making in all the sum of Fifty-five thousand two hundred eighty-three and 88/100 ($55,-283.88) Dollars, and that execution issue therefor.

Judgment signed and entered May 16th, 1925, at 11:55 A. M.

Edward W. Cox, Clerk. (Seal.)

Dated New York, May 16th, 1925.

[File endorsement omitted.]

Compared. Maher and Murray.

County Clerk's Office,
State of New York,
County of Queens, ss:

I, Edward W. Cox, Clerk of the County of Queens and of the Courts of Record thereof, do hereby certify that I have

compared the annexed with the original judgment entered in my office May 16, 1925, and that the same is a true transcript thereof, and of the whole of such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said County and Court this 1 day of June, 1925.

Edward W. Cox, Clerk. (Seal.)

[fol. 95] All of which we have caused by these Presents to be exemplified and the Seal of our said Court for said County to be hereunto affixed.

Witness Hon. William J. Kelly, Presiding Justice of our Supreme Court in and for the Second Judicial Department of said State, this nineteenth day of May, 1925, and in the 148th year of the Independence of the United States.

Edward W. Cox, Clerk.

I, William J. Kelly, Presiding Justice of the Supreme Court of the State of New York in and for the Second Judicial Department thereof, do hereby certify that Edward W. Cox, whose name is subscribed to the preceding exemplification, is the Clerk of the County of Queens, and Clerk of the Supreme Court in and for said County, and that full faith and credit are due to his official acts.

I further certify that the seal affixed to said exemplification is the proper seal of said Court for said County, and that the attestation thereof is in due form of law and by the proper officer.

Witness my hand this 20th day of May, in the year 1925.

William J. Kelly, Presiding Justice of the Supreme Court of the State of New York in and for the Second Judicial Department.

[fol. 96] State of New York,
County of Queens, ss:

I, Edward W. Cox, Clerk of the County of Queens, and also Clerk of the Supreme Court of said County, in and for the Second Judicial Department of said State (said court being a court of record), do hereby certify that Hon. William J. Kelly, whose name is subscribed to the foregoing certificate, is Presiding Justice of the Supreme Court of said State in and for the Second Judicial Department, duly

elected and sworn, and that the signature of said Justice to said certificate is genuine.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said County and Court, this 21st day of May, in the year 1925.

Edward W. Cox, Clerk. (Queens County Seal.)

[fol. 97] In United States District Court, Southern District of New York

Robert L. Hatch, Plaintiff,

against

Morosco Holding Co., Inc., Defendant

Petition for and Order Allowing Appeal

To the Honorable District Judges of the United States Circuit Court of Appeals for the Second Circuit:

John Martin Riehle, Receiver of the Morosco Holding Co., Inc., the defendant in the above-entitled action, feeling aggrieved by that certain order made and entered in the above-entitled action on the 20th day of October, 1927, confirming the report of Bern Budd, Esq., the Special Master herein, and entering a decree thereon, and by that certain intermediate order made and entered the 12th day of July, 1927, in the above-entitled action, vacating an order of this Court in this action dated the 15th day of March, 1926, and referring the claim of Edward Margolies to Bern Budd, Esq., the Special Master herein, does hereby appeal from each of said orders to the United States Circuit Court of Appeals for the Second Circuit, for the reasons set forth in the Assignment of Errors filed herewith, and prays that this appeal be allowed, and that a citation be issued directed to Edward Margolies, one of the claimants in the above-entitled action, commanding him to appear before said Circuit [fol. 98] Court of Appeals and to do and receive what may appertain to justice to be done in the premises; and that a transcript of the record, proceedings and documents upon which the said orders were based and entered, duly authenticated, be sent to the United States Circuit Court of Ap-

peals for the Second Circuit, under the rules of such Court in such cases made and provided.

F. Wright Moxley, Attorney for John Martin Riehle, Receiver. Office & P. O. Address: 1560 Broadway, Borough of Manhattan, City of New York.

Dated New York, November 2nd, 1927.

And now, to wit, on November 11, 1927, it is ordered that the appeal be allowed as prayed for.

Jno. C. Knox, United States District Judge.

[fol. 99] In United States District Court

[Title omitted]

Assignment of Errors

Now comes John Martin Riehle, the Receiver of the Morosco Holding Company, Inc., the defendant above named, and files the following assignment of errors, upon which he will rely upon the prosecution of the appeal in the above enttiled case, from the order made by this Honorable Court on the 20th day of October, 1927, and from that certain intermediate order made by this Court on the 12th day of July, 1927, both duly entered in the office of the Honorable Clerk of this Court:

I. The Court erred in granting the motion made by one of the claimants herein, to wit, Edward Margolies, for an order confirming the report of Bern Budd, Esq., the Special Master herein, dated September 23rd, 1927, and filed on or about said day with the Honorable Clerk of this Court.

II. The Court erred in granting the motion of the aforesaid claimant, Edward Margolies herein, and denying the motion of the Receiver herein, John Martin Riehle, for a rejection of the report of the said Special Master herein, dated September 23rd, 1927, and on or about said date duly filed in the office of the Honorable Clerk of this Court.

III. That the Court erred in confirming the finding of the Special Master herein to the effect that the said Edward

Margolies was entitled to a claim against the receivership [fol. 100] estate of the defendant, Morosco Holding Company, Inc., in the sum of $55,101.41.

IV. That the Court erred in sustaining the findings of the Special Master to the effect that the Receiver had no right to offer proof upon the question as to the actual amount which the said claimant, Edward Margolies, might properly claim against the Morosco Holding Company, Inc.

V. The Court ererd in holding that the judgment of the Supreme Court of the State of New York, for the County of Queens, was binding and conclusive as a claim upon the Receiver in the equity procedings hereinabove entitled.

Wherefore the appellant prays that the orders appealed from be reversed and that the report of the Special Master be vacated and set aside, disaffirmed and disallowed, and that the Honorable Court below be instructed to refer the claim of Edward Margolies to a Special Master for hearing, and upon said hearing said Receiver shall be entitled to adduce such testimony as shall in his opinion tend to show and to prove that the amount of any claim which the said Edward Margolies may have against the defendant, the Morosco Holding Company, Inc., is in a sum much less than $55,101.41, and that the said Receiver at such a hearing shall be entitled to examine the said Edward Margolies with respect to the said claim upon which the said judgment hereinabove mentioned is based.

F. Wright Moxley, Solicitor for John Martin Riehle, Receiver of Morosco Holding Company, Inc. Office & P. O. address: 1560 Broadway, Borough of Manhattan, City of New York.

[fols. 101 & 102] Citation, in usual form, omitted in printing.

[fols. 103-106] Bond on appeal for $250.00 approved; omitted in printing.

[fol. 107] In United States Circuit Court of Appeals for the Second Circuit

Robert L. Hatch, Plaintiff,

against

Mohawk Holding Company, Inc., Defendant

John Mactan Riehle, Receiver, Appellant,

against

Edward Mannheim, Claimant Appellee

Order Waiving Equity Rule 75

On motion of F. Wright Morley, attorney for the appellant, it is

Ordered that the provisions of Rule 75 of the Rules of Practice in Equity in regard to stating the testimony of witnesses in narrative form be waived, and that the testimony be reproduced in the exact words of the witnesses.

Henry W. Goddard, United States District Judge.

Dated January 6th, 1928.

The entry of the above order is hereby consented to.

F. Wright Morley, Attorney for Appellant. Nathan Burkan, Attorney for Appellee.

U. S. S. District Co., S. D. of N. Y. Filed Jan. 7, 1928.

[fol. 108] In United States District Court

[Title omitted]

Stipulation as to Contents of Record

It is hereby stipulated that the Record on Appeal herein shall contain the following papers:

1. Bill of complaint.

2. Answer.

3. Notice of motion, read in support of motion.

6. Stenographer's minutes of proceedings held before the Special Master.

5. Report of Special Master.

6. Exceptions to report of Special Master.

7. Stenographer's minutes on hearing before Hon. Francis A. Winslow on motion to confirm the Special Master's report.

8. Order of Francis A. Winslow, Judge of the District Court of the United States for the Southern District of New York, dated the 13th day of July, 1927, referring claim of Edward Margolies against Warren Holding Company, Inc., to Special Master for hearing, with instructions as to said Special Master's procedure, being the intermediate order appealed from herein.

[fol. 109] 9. Order of Francis A. Winslow, Judge of the District Court of the United States for the Southern District of New York, dated the 20th day of October, 1927, being the order appealed from herein.

10. Exemplified copy of judgment roll, being a part of the record before the Special Master on the hearing of the claim of Edward Margolies.

11. Petition for and order allowing appeal, dated respectively November 2nd, 1927, and November 10th, 1927.

12. Assignment of errors.

13. Citation.

14. Bond on appeal.

15. Order waiving Equity Rule 75.

16. Stipulation as to contents of record.

17. Stipulation as to correctness of the transcript of the record.

18. Stipulation extending time to file.

19. Stipulation extending time to file.

20. Stipulation extending time to file.

29. Order approving of the record and order the Clerk to certify the same.

31. Certificate of the Clerk as to the correctness of the preparation of the record.

F. Wright Hanby, Attorney for John Martin Riddle, Receiver of Western Holding Company, Appellant.
Nathan Burkan, Attorney for Edward Margolies, Respondent.

Dated New York, January 5, 1920.

[3rd 1921] In Chancery Supreme Court of New York

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing record is a true and correct transcript of the record and proceedings had herein and may be certified by the Clerk of the Court and filed in the office of the Clerk of the Court of Appeals.

F. Wright Hanby, Attorney for John Martin Riddle, as Receiver of Western Holding Company, Appellant. Nathan Burkan, Attorney for Edward Margolies, Respondent.

Dated New York, January 5, 1920.

[3rd 1921] In Chancery Supreme Court of New York on Appeal, Second Division

[Title omitted]

Stipulation Extending Time to File

It is hereby stipulated that the time of the defendant-appellant to file his record on appeal in the above-entitled appeal shall be extended for ten days from the 20th day of December, 1921.

Nathan Burkan, Attorney for Defendant-Respondent.
F. Wright Hanby, Attorney for Defendant-Appellant.

Dated December 7, 1921.

So ordered. Alex Gilchrist, Jr., Clerk United States District Court.

Filed December 6, 1927.

[Ed. 112] In United States Circuit Court of Appeals, Second Circuit

[Title omitted]

Stipulation Extending Time to File

It is hereby stipulated that the time of the defendant-appellant to file his record on appeal in the above-entitled appeal shall be extended for twenty days from the 29th day of December, 1927.

Nathan Burkan, Attorney for Claimant-Respondent.
F. Wright Wesley, Attorney for Defendant-Appellant.

Dated December 15th, 1927.

So ordered. Alex Gilchrist, Jr., Clerk United States District Court.

Filed 12/20/27.

[Title 112-A 112] In United States Circuit Court of Appeals, Second Circuit

[Title omitted]

Stipulation Extending Time to File

It is hereby stipulated that the time of the defendant-appellant to file his record on appeal in the above-entitled appeal shall be extended for ten days from the 20th day of January, 1928.

Nathan Burkan, Attorney for Claimant-Respondent.
F. Wright Wesley, Attorney for Defendant-Appellant.

Dated January 9th, 1928.

So ordered: Alex Gilchrist, Jr., Clerk United States District Court.

Filed Jan. 6/28.

[fol. 115] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 116] In United States Circuit Court of Appeals for the Second Circuit, October Term, 1927

No. 294

Argued April 12, 1928. Decided May 7, 1928

Henry L. Hatch, Plaintiff,

v.

Watson Holding Company, Inc., Defendant; Ex Parte Eugene Margolies, Appellee

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

Opinion

Appeal from a decree of the District Court for the Southern District of New York allowing a claim against a receiver in a creditors' bill.

In Hatch v. Watson Holding Co., Inc. (Ex parte Margolies) 19 F. (2d) 246, this court reversed an order of the District Court expunging the claim now in suit, and held that the judgment recovered in the state court against the defendant was conclusive. Upon the new hearing before the special master Margolies again put in evidence the judgment and rested. The receiver thereupon offered to prove that the claim was less than the amount of the judgment, but the evidence was excluded and the claim fixed in the equity suit in the amount found in the judgment.

The District Court sustained the special master and the receiver appealed.

F. Wright Morley, of New York City, for appellant.
Nathan Burkan, of New York City, for appellee.

Per Curiam: A majority of the court, as it is now constituted, think that our first decision impairs the jurisdiction of the District Court over assets already in its custody when the judgment of the state court was entered. They believe that the liquidation of claims is a part of the distribution of the estate, since it determines how much each creditor shall get, and that the distribution of the estate is part of what is usually understood as jurisdiction over the res. However, the former decision was reached after unusual deliberation and full presentation of all the questions involved. If it is to be changed, only the Supreme Court may do so; in the same case and on the same claim the first ruling must stand.

Order affirmed.

[fol. 117] In United States Circuit Court of Appeals, Second Circuit

Robert L. Hatch, Plaintiff,

v.

Reliance Holding Company, Defendant; J. M. Hanna, Appellant

Appeal from the District Court of the United States for the Southern District of New York

Decree—Filed May 14, 1929

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court of accordance with this decree.

L. H., T. W. S.

[File endorsement omitted.]

[fol. 118] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 119] Supreme Court of the United States

Order Allowing Certiorari—Filed October 22, 1928

The petition here for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 33,656. U. S. Circuit Court of Appeals, Second Circuit. Term No. 347. John Martin Biehle, as receiver in equity of the Morocco Holding Company, Inc., petitioner, vs. Edward Margolies. Petition for writ of certiorari and exhibit thereto. Filed August 14th, 1928. File No. 33,656.